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**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1972**

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**No. 72-5847**

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**HARRELL ALEXANDER, SR.,** *Petitioner*

**v.**

**GARDNER-DENVER COMPANY,** *Respondent*  
**a Delaware corporation**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT**

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**BRIEF FOR THE RESPONDENT**

**OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 466 F.2d 1209 (10th Cir. 1972), and appears at pages 45-47 in the Appendix. The District Court opinion appears in the Appendix at pages 33-43 and is reported in 346 F.Supp. 1012 (D. Colo. 1971).

## STATUTORY PROVISIONS INVOLVED

Suit was brought in the District Court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Subsequent to the ruling of the U. S. District Court in this case, and prior to the ruling by the United States Court of Appeals for the Tenth Circuit, the provisions of the Act were amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 effective March 24, 1972.

## JURISDICTION

The opinion and order by the Court of Appeals for the Tenth Circuit was entered on August 11, 1972, affirming, *per curiam*, the District Court's dismissal of Petitioner's claim entered on July 12, 1971. On November 4, 1972, Mr. Justice White signed an order extending the time for filing the petition for certiorari up to and including December 8, 1972. The petition was filed on December 8, 1972 and was granted on February 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1970).

## QUESTION PRESENTED

Were the lower courts correct in concluding that when a discharged Black employee

- a. voluntarily requests arbitration of his discharge under a collective bargaining agreement which proscribes discharge based on race, and
- b. raises the issue of race before the arbitrator, and
- c. receives an unfavorable decision and award from the arbitrator,

said employee is bound by the arbitration decision and precluded from maintaining an individual Title VII action?

## STATEMENT OF THE CASE

Petitioner, Harrell Alexander, Sr. (hereafter called Alexander) was employed by Respondent Gardner-Denver Company (hereafter called the Company) at Denver, Colorado for approximately three years and four months. He was discharged in September, 1969. Alexander is Negro. At the time of his discharge he was a trainee in the Drill Department.

Prior to his discharge, Alexander had been twice warned that his performance on his machine was unsatisfactory and on the second of those occasions, he was temporarily suspended from work for two days. (App. 19) The third similar occasion resulted in his discharge. (App. 20) On October 1, 1969, Alexander filed a grievance under the collective bargaining agreement alleging "I feel I have been unjustly discharged . . ." (App. 32)

The Union is the United Steelworkers of America, AFL-CIO, Local 3029 (hereafter called the Union). The collective bargaining agreement provides for a four-step grievance procedure prior to binding arbitration. (App. 26-27) The Union processed Alexander's grievance through the four grievance steps and no results favorable to Alexander were obtained. The matter was then referred to Arbitrator Don W. Sears, then Dean of the University of Colorado Law School, (App. 34), a former labor law professor, author, co-author and co-editor of legal texts on labor law, and a member of the Colorado Advisory Commission, U. S. Civil Rights Commission.<sup>1</sup>

The pertinent portions of the grievance and arbitration provisions of the collective bargaining agreement read as follows:

### Section 5 (App. 26)

Should differences arise between the Company and the Union as to the meaning and application of the provisions

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1. 1972 *Directory of Law Teachers* 538 (West Publishing Co.); *Directory of Arbitrators, Labor Arbitration Reports*, Index covering volumes 41-50, at 1296 (1969).

of this Agreement, or should any trouble arise in the plant, there shall be no suspension of work, but an earnest effort shall be made by both the Company and the Union to settle such differences promptly . . . .

\* \* \* \* \*

#### **Step 5 (App. 27)**

. . . The decision of the arbitrator shall be final and binding upon the Company, the Union, and any employee or employees involved . . . .

At no point in the grievance procedure or during the arbitration did the Union or Alexander designate which portion or portions of the Union contract were allegedly violated by Alexander's discharge. The two provisions of the Union agreement which would have applicability were:

#### **Article 5, Section 2, (App. 23)**

The Company and the Union agree that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry . . . .

\* \* \* \* \*

#### **Article 23, Section 6(a), (App. 28)**

No employee will be discharged, suspended or given a written warning notice except for just cause.

Prior to the arbitration hearing, Alexander had written a letter to the Union on October 10, 1969, asserting, in part, that: (App. 30)

I am knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I, Harrell Alexander, have been the target of preferential discriminatory treatment.

The matter was heard by Arbitrator Sears on November 20, 1969. When Alexander testified at the arbitration hearing, he maintained the racial issue. (App. 14) On December 30, 1969, Arbitrator Sears issued a written opinion and award (App. 18-22) finding that "... the grievant was discharged for just cause." (App. 22) The arbitrator did not specifically discuss the racial issue in his opinion.

While the grievance was ascending the grievance steps, Alexander filed employment discrimination charges with the Colorado Civil Rights Commission, which Commission later terminated its proceedings. (During the arbitration hearing Alexander mentioned the state charge to the arbitrator.) (App. 14) On November 5, 1969, Alexander filed a discrimination-in-employment charge with the Equal Employment Opportunity Commission (hereafter called the EEOC). On July 25, 1970, the EEOC advised Alexander that it found no probable cause for believing a violation of Title VII existed in his case; the EEOC also advised Alexander he could sue the Company in U. S. District Court. (App. 33) Alexander filed a complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq, alleging he was discriminatorily discharged; the complaint was filed by court appointed counsel. (App. 3-5) The U. S. District Court at Denver, Colorado granted the Company's motion for summary judgment and dismissed the action on July 1, 1971. (App. 33-43) The United States Court of Appeals for the Tenth Circuit affirmed the District Court *per curiam* on August 11, 1972. (App. 45-47) Both lower courts found that the charge of racial discrimination was before the arbitrator, (App. 34, 46), and that the issue could not be relitigated in federal courts.

## SUMMARY OF ARGUMENT

The decisions of the courts below finding that Alexander's charge of racial discrimination was before the arbitrator and was rejected by him cannot be overturned unless clearly erroneous. Alexander's deposition wherein he stated his *ex post facto* derogatory conclusions as to treatment his discrimination claim received at the arbitration can be given no weight, and it must be assumed that the lower courts discounted Alexander's retrospection before making their findings.

In the case at bar, two overriding public policy considerations and Congressional mandates are at play, *i.e.*, the necessary endorsement of the labor arbitration process as expressed in Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185(a) and as interpreted by the Court in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) and its progeny, and the concern of Congress that an employee alleging an act of employment discrimination be permitted to vindicate his rights in court. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. The Company herein submits that both interests can be reconciled and that the courts below were correct in precluding a relitigation of Alexander's discrimination charge in a Title VII action because he first voluntarily litigated the question at the arbitration hearing and lost.

Several circuit courts have treated the same question differently, leaving a morass of confusion. Their theories may be summarized as follows:

1. An arbitration of a Title VII claim can have no effect on a subsequent Title VII action.
2. An arbitration award is binding and dispositive of the Title VII action if the Title VII action is filed after the arbitrator's award.
3. District courts may defer to an arbitrator's award if a number of specified conditions are met.

Each of the theories named above contains a fatal flaw. To hold that an arbitrator's award on a discrimination in employment claim can have no impact on a Title VII action is to

undermine the clear mandate of Congress in passing Section 301 of the Labor-Management Relations Act which provides for the enforcement of collective bargaining agreements, and contradicts this Court's long standing endorsement of the labor arbitration process as promulgated in *Lincoln Mills* and its progeny; it would operate to create such a broad exception to the rule of *Lincoln Mills* that the exception would engulf the rule. There are five classes of potential claimants protected under Title VII and conceivably most employees filing grievances would fall under one of those five classes. Additionally, there are approximately 160,000 collective bargaining agreements in the United States covering some 25,000,000 employees and 94% of those agreements contain provisions for binding arbitration; since an overwhelming number of today's collective bargaining agreements contain non-discrimination clauses, it is more than likely that employment discrimination claims will be enmeshed in many, many industrial labor arbitrations, particularly since minority groups today are acutely sensitive to discriminatory employment practices. Thus the impact of such an exception to *Lincoln Mills* would emasculate its holding.

To hold that an arbitration award is binding on a Title VII action only if the Title VII action is filed after the award is rendered, is an arbitrary policy totally lacking logical justification. First, it is apparent that because of the procedural steps required of a complaining employee which operate as conditions precedent to his filing of a Title VII suit, the arbitrator's award would invariably be rendered before a Title VII action is filed. Therefore, the mechanical application of this rule would operate to defeat most, if not all, Title VII actions. Second, to hold that if an employee simultaneously invokes both statutory and contract procedures, he thereby preserves his Title VII action is specious reasoning. When an employee proceeds under both procedures simultaneously, he thereby indicates his awareness of his Title VII statutory remedies and thus evidences his ability to knowingly preserve his Title VII action by *not* submitting the discrimination question to the arbitrator. It follows that if he does continue to press the charge of discrimination in the arbitral forum while his Title VII action is pending, he thereby indicates that he chooses

to cast the fortunes of his discrimination claim upon the arbitral waters. Therefore, the Company views the simultaneous use of both contract and statutory procedures as having a preclusive impact upon the Title VII action, rather than a permissive impact.

While a concept of liberal deferral by the district courts to an arbitrator's award is not repugnant to the Company, the multiple rules for deferral as specified by the Fifth Circuit are totally unacceptable because they amount to a requirement that the arbitration, both substantively and procedurally, duplicate a U.S. District Court trial, and thus require arbitration to be exactly that which it was not intended to be: 1) lengthy, 2) costly, 3) unnecessarily complicated, 4) legalistic. The arbitrator's ability to dispense timely industrial justice is materially hampered.

The Company suggests that this Court adopt a policy of liberal deferral to the arbitrator's award if the following three criteria are met:

1. The charge of discrimination was before the arbitrator.
2. The contract prohibited the form of discrimination charged.
3. The arbitrator had authority to rule on the charge and fashion a remedy.

This Court in the past has recognized that the choice of the arbitral forum may affect the scope of the substantive rights to be vindicated before that forum. *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1970). However, this is not wholly repugnant because the parties themselves have consented to the use of that forum.

The Company submits the premise that a Title VII claimant cannot be *required* by law to submit the statutory charge of discrimination to the arbitration process. However, if the employee voluntarily chooses to submit his discrimination claim to arbitration after his claim has arisen, he must be bound by the arbitrator's award and the deferral criteria specified above would be applied by the District Court in reviewing that award.

The choice of the arbitral forum must be made by the employee after the controversy arises and he is not bound by the Union's agreement to arbitrate such disputes. The key is the consent of the employee. The employee would not be precluded from his Title VII action if he chose to process his claim through the *grievance* steps of the contract; it is only when he submits his discrimination case to an arbitrator that the Company's doctrine would operate. Nor would the Company's doctrine operate to preclude the employee from filing a charge with the EEOC even though he has received an adverse award from the arbitrator. For public policy considerations, the EEOC may choose to file suit itself against the employer representing a class of employees similarly situated and the arbitration could not, of course, operate to deprive the EEOC of that action.

Congress never contemplated a situation wherein an employee voluntarily chose to submit a statutory claim to an arbitrator under a collective bargaining agreement. Congress intended only to give the employee a right to sue in U.S. District Court if he so chose. As possessor of that right, the employee can use it fully by filing both an individual and a class action, use it partially by filing only an individual action, use it not at all, or submit it to another forum.

The 1972 Amendments to the Civil Rights Act which dictated that findings by a State or local civil rights agency should be given "substantial weight" by the EEOC only evidences Congress' fear that the employee might be *required* by a sovereign, a law, or a procedure to accept something less than his day in a U. S. District Court to vindicate a discrimination in employment claim; and Congress did not address itself to, nor did it proscribe, the voluntary selection by the employee of an alternate forum for the airing of the civil rights claim. Since the essence of the relationship between Alexander and the Company herein is consensual, the result of that relationship must be accorded full weight.

## ARGUMENT

## I.

THE CHARGE OF RACIAL DISCRIMINATION  
WAS BEFORE THE ARBITRATOR.

Alexander's brief is devoted, in part, to attacking the lower court's findings that the charge of racial discrimination was before the arbitrator.<sup>2</sup> The Company proposes to treat the point as a threshold obstacle since the balance of the Company's position stated *infra* is predicated on the fact that the charge of racial discrimination in employment was before the Arbitrator. It must be remembered that Alexander's deposition was taken one year<sup>3</sup> subsequent to the arbitration hearing and so the *ex post facto* nature of Alexander's recount and description of what took place at the arbitration must be taken into consideration, especially where Alexander alleges in his deposition that he was not adequately represented by the Union on the racial issue (App. 13-14). On a reading of the entire excerpt of the deposition (App. 11-16) one conclusion is unavoidable, that is, both Alexander and the Union raised the charge of racial discrimination at the hearing,<sup>4</sup> and Alexander's conclusionary criticisms one year later of the adequacy of the hearing on the racial issue are of no value herein.

It must be assumed that both lower courts, on a review of the deposition, rejected Alexander's retrospective conclusions on the adequacy of the hearing on the racial issue, and concluded racial discrimination was charged at the hearing. The District Court opinion stated: (App. 34)

... Alexander's deposition taken in this case acknowledges that this charge [racial discrimination] was before the arbitrator . . . . The present posture of the case, then, is that the Commission [EEOC] did not find probable cause that Plaintiff's charge of discrimination was true, and with

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2. Brief for Petitioner at 41-44.

3. Alexander's deposition was taken on November 27, 1970; this information is not included in the appendix.

4. App. 13-14.

that same charge of racial discrimination before him, the Dean of the University of Colorado Law School, sitting as an arbitrator found against Plaintiff and found that he was discharged for just cause.

On review, the U. S. Court of Appeals for the Tenth Circuit wrote, "The issue of racially-motivated discriminatory employment practices was presented to the arbitrator and rejected." (App. 46)

Rule 52(a), Federal Rules of Civil Procedure, states that lower court findings of fact shall not be set aside unless clearly erroneous. This Court has had numerous opportunities to interpret that rule and unfailingly has endorsed the spirit of the rule. See *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 495 (1950), wherein it was stated:

It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.

We do not suppose that this Court will now embark upon a new policy toward lower court fact findings on the occasion at bar.

## II.

THE CONFLICT OF ARBITRATION AND TITLE VII  
IN EMPLOYMENT DISCRIMINATION CASES.

To crystalize the clash of those vital legal premises which are at loggerheads herein, a brief review of where arbitration stands today, how it got there, and how the Title VII question relates to it is appropriate.

At common law, the courts were historically hostile toward agreements to arbitrate because it was considered to be an ouster of the jurisdiction of the courts.<sup>5</sup> This hostility was abated by Congress in 1925 when it enacted the *United States Arbitration Act*<sup>6</sup> which provided that arbitration agreements shall be valid, irrevocable and enforceable; thereafter the courts viewed the Arbitration Act as evidencing a Congressional policy to favor arbitration, at least commercial arbitration.<sup>7</sup> In the field of industrial labor relations this Court has consistently endorsed the arbitral process in labor disputes.

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5. *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1012 (S. D. N. Y. 1915); Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev., 233 (1950).

6. 9 U.S.C. §§ 1-14.

7. The applicability of the United States Arbitration Act to labor disputes has often been queried since the Act excludes contracts of employment from its coverage. By 1956 the first, second and sixth circuits had held that collective bargaining agreements were covered by the Act. *Local 205, United Electrical Workers v. General Electric Co.*, 233 F.2d 85 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547 (1957); *Signal-Stat Corp. v. Local 475, United Electrical Workers*, 235 F.2d 298 (2nd Cir. 1956), *cert. denied*, 354 U.S. 911 (1957); *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49 (6th Cir. 1954); and the third, fourth and fifth circuits had held they were excluded. *Tenney Engineering Inc. v. United Electrical Workers, Local 437*, 207 F.2d 450 (3rd Cir. 1953); *United Electrical Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954); *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (5th Cir. 1956), *rev'd*, 353 U.S. 448 (1957).

The United States Supreme Court had an opportunity to rule on the question in 1957 in *Lincoln Mills*, *supra*, and *Local 205*, *supra*. In those cases the court held that Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 was a positive grant of substantive power to the federal

In *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), this Court held that under Section 301(a) of the *Labor-Management Relations Act*,<sup>8</sup> an agreement to arbitrate disputes in a collective bargaining contract should be specifically enforced by the federal courts; the Court recognized the Congressional policy relative to Section 301 that placed sanctions behind agreements to arbitrate labor disputes. The progeny of *Lincoln Mills* grew quickly and consistently. In the *United Steelworkers Trilogy* (1960)<sup>9</sup> this Court again recognized the national policy in favor of labor arbitration, once more endorsed the private settlement machinery, and cautioned the lower courts against usurping the arbitrator's function. In one of those cases, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), this Court made it clear that labor arbitration must have a higher level of judicial respect than that normally accorded other forms of arbitration.

In the commercial case, arbitration is the substitute for litigation. Here, arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place

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7. Cont'd.

courts to enforce collective bargaining agreements, and the Court did not rule upon the applicability of the Arbitration Act; however, Mr. Justice Frankfurter's dissent in *Lincoln Mills* stated that the majority opinion implicitly rejected the availability of the Arbitration Act to enforce arbitration clauses in collective bargaining agreements. Subsequently, the circuits found it necessary to continue to wrestle with the problem. See *Local 149, American Federation of Technical Engineers v. General Electric Co.*, 250 F.2d 922 (1st Cir. 1957), *cert denied*, 356 U.S. 938 (1958). For the purposes of the case at bar, the Company will assume the accuracy of Mr. Justice Frankfurter's supposition, especially since the Court has remained silent on the issue in subsequent cases cited elsewhere herein. See cases cited note 9, *infra*.

8. 29 U.S.C. § 185(a).

9. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself. 363 U.S. at 578.

This policy of judicial sanction for labor arbitration was applied by this Court in a string of post-trilogy cases<sup>10</sup> and today still remains intact.

The case at bar, however, does not lend itself to an automatic application of the principles of this Court expressed above regarding labor arbitration. The case at bar concerns the exercise by an employee of an explicit right to sue his employer given him by Title VII of the *Civil Rights Act of 1964*, 42 U.S.C. § 2000e et seq.<sup>11</sup> when he feels he has been the victim of racial discrimination at the hands of his employer.

#### Section 703(a)

It shall be an unlawful employment practice for an employer, (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

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10. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), (Strike over arbitrable question merits damages); *Drake Bakeries, Inc. v. Local 50, American Bakery and Confectionary Workers International*, 370 U.S. 254 (1962), (strike damages arbitrable); *General Drivers, Warehousemen and Helpers, Local 89 v. Riss and Co., Inc.*, 372 U.S. 517 (1963), (award of contract "committee" rather than arbitrator is enforceable if it binds both parties); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964), (dispute is arbitrable even if NLRB may have jurisdiction over the problem); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), (arbitration clause can be binding on company's successor); *Republic Steel v. Maddox*, 379 U.S. 650 (1965), (employee claiming contract violation must attempt use of grievance procedure before bringing suit); *Boys Markets, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970), (strike over arbitrable dispute is enjoined).

11. Amended while this case was on appeal to the U.S. Court of Appeals by the Equal Employment Opportunity Act of 1972, effective March 24, 1972. Pub. L. No. 92-261, 86 Stat. 103 (1972).

**Section 706(e)**

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under sub-section (c) . . . the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved . . . .<sup>12</sup>

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**Section 706(f)**

Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title . . . .

Unquestionably Congress intended that the employee have access to the court house for vindication of his Title VII rights, if he so chose.

However, the employee herein, Alexander, invoked the arbitration machinery under the collective bargaining agreement,

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12. This language was changed by the 1972 amendments as follows:

**Section 706(f)(1)**

. . . If a charge filed with the Commission pursuant to sub-section (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under sub-section (c), or (4) of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . . Pub.L.No. 92-261, 42 U.S.C.A. § 2000e-5 (Supp. 1972).

made the charge of racial discrimination at the arbitration hearing, and processed the dispute to a final arbitrator's award which concluded Alexander was discharged for just cause. It will be recalled, Alexander instituted his statutory procedures shortly prior to the arbitration hearing and filed his Title VII action subsequent to the arbitrator's award.

There is no mention in Title VII of the role that arbitration procedures under collective bargaining agreements are to play in matters involving racial discrimination in employment.<sup>13</sup> This Court therefore must determine legislative intent by the sound application of judicial principles and precedent.<sup>14</sup> If this Court determines that it was not the intent of Congress to undermine the role of labor arbitration, or to carve an exception to the binding impact of arbitration for Title VII cases, then this Court must herein define the rules by which lower courts shall govern themselves in striking a balance between labor arbitration and Title VII, even if it means legislating interstitially.<sup>15</sup> Judge Learned Hand stated:

"Justice is the tolerable accommodation of the conflicting interests of society."<sup>16</sup>

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13. See *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 311 (5th Cir. 1970).

14. *Fekete v. U.S. Steel Corp.*, 424 F.2d 331, 334 (3rd Cir. 1970); *Hutchings v. U.S. Industries, Inc.*, *Id.* at 311.

15. "We often must legislate interstitially . . . to fill gaps resulting from legislative oversight. . . ." Mr. Justice Douglas, writing for the majority in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 354 (1970).

16. *The International Dictionary of Thoughts* 415 (1969).

III.  
**AN EMPLOYEE CANNOT BE REQUIRED  
TO ARBITRATE A STATUTORY CLAIM.**

Although not directly involved herein, it is necessary to answer the question of whether or not a Title VII claimant can be required to arbitrate his claim under a collective bargaining agreement which proscribes the same activity that gives rise to the Title VII action. If the arbitrator's award is to be final and binding, as the Company proposes, but the selection of the arbitral forum is mandatory, not optional, then the intent of Congress in explicitly providing the claimant with his day in court would clearly be frustrated. The Company submits that, for reasons expressed below, arbitration cannot be required of the Title VII claimant if he chooses not to process the question through arbitration, but prefers to invoke court action only. We review the relevant cases, not only because some circuit court opinions have cast some doubt on the accuracy of this premise, but because this premise must be firmly established by the Company herein or the Company's argument that Alexander's arbitration award is final and binding must, we think, fail.

As a general rule, an employee claiming a labor contract violation (as distinguished from a statutory violation) must first resort to the grievance machinery of the agreement for his vindication, and not to the courts. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). He may look to the courts for enforcement of his contractual rights if "the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, . . . the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

But where an employee is statutorily granted a right to sue his employer on a claim that would also be arbitrable, this Court has not required him to arbitrate prior to filing suit. This was the holding in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1970), where § 596 of the Seamen's Act of 1790, ch. 29, 1 Stat. 133, as amended, 46 U.S.C. § 596 (1970),

authorized an employee to sue his employer on a wage claim. Similarly, where the Sherman Anti-Trust Act, ch. 647, 26 Stat. 209, *as amended*, 15 U.S.C. § 1 et seq (1970), authorized an aggrieved person to sue for another's violation of anti-trust laws, and an agreement to arbitrate such claim is entered into between the parties before a particular controversy arises, the courts will not require the claim to be arbitrated before the statutory court action can be pursued. *American Safety Equipment Corp. v. J. P. McGuire & Co.*, 391 F.2d 821 (2d Cir. 1968).<sup>17</sup>

Each of these statutes, like Title VII, was designed to cure an ill of society prevailing at the time of their passage and to protect a particular class of society from traditional abuses, and each, like Title VII, authorizes court suit for vindication of the rights granted the beneficiaries of those statutes. Questions arose under these statutes concerning the propriety of the judiciary requiring a beneficiary of the statute, who was otherwise bound by an agreement to arbitrate controversies identical to those under the statute, to first arbitrate the dispute.

In *Arguelles, supra*, a seaman brought an action in District Court under the Seamen's Act of 1790 to recover wages allegedly due him. The Act provides a penalty for an employer's failure to make prompt payment of wages without sufficient cause. The seaman was also subject to a collective bargaining

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17. The enforcement of an arbitration clause in the face of a statutory right to sue over the same complaint has also been questioned under the Securities Act of 1933, ch. 38, 48 Stat. 74, *as amended*, 15 U.S.C. § 77a et seq (1970), and under the Railway Labor Act, ch. 347, 44 Stat. 577, *as amended*, 45 U.S.C. § 151 et seq (1970), however, these cases are inapposite because of the peculiar wording in each statute. The Securities Act, Section 14, 48 Stat. 84, 15 U.S.C. § 77n (1970), specifically prohibits a beneficiary of the statute from waiving benefits of the statute, which of course would include the statutory right to sue. *Wilko v. Swan*, 346 U.S. 427 (1953).

The Railway Labor Act, Section 153, ch. 347, 44 Stat. 578, *as amended*, 15 U.S.C. § 153 (1970), clearly defines an administrative procedure which must be employed before an employee may exercise his right to sue. *Andrews v. Louisville & Nashville Ry. Co.*, 406 U.S. 320 (1972).

agreement which contained provisions concerning seamen's wages and which also required arbitration of disputed claims not settled through the grievance procedure. The seaman made no attempt to comply with the contract provisions but brought suit under the Seamen's Act instead. This Court held that the seaman was not required to exhaust his contractual remedies before bringing suit. It construed the Seamen's Act and arbitration as providing optional remedies to seamen. Mr. Justice Harlan, concurring, distinguished *Maddox*, *supra*, on the grounds that Maddox's suit was "simply on the contract" whereas Arguelles' claim was also based on a statutory right. 400 U.S. at 362. The majority opinion in *Arguelles*, did not question the continuing validity of the rules announced in *Maddox* and *Vaca v. Sipes*, *supra*. In the majority's view, the Court's function is to determine whether Section 301 of the Labor-Management Relations Act (as viewed by the court in *Lincoln Mills*) abrogated the earlier Seamen's Act with respect to seamen's wages; no legislative history in the Labor-Management Relations Act was uncovered which would indicate that arbitration was to assume part or all of the roles served by the federal courts charged with protecting the rights of seamen since 1790 — therefore, the Labor-Management Relations Act was construed as providing only an optional remedy.

In *American Safety Equipment Corp.*, *supra*, the court declined to require a claim under the Sherman Anti-Trust Act to be arbitrated even though that claim could be the subject of a previously agreed-upon binding arbitration agreement. The court's rationale was that the pervasive public interest in enforcement of the anti-trust laws, and the public nature of the claims that arise in such cases, make those matters inappropriate for mandatory arbitration.<sup>18</sup> The court expressly excepted from its opinion the efficacy of an agreement to arbitrate

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18. *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968), where in addressing itself to the anti-trust issue and its arbitrability the court stated: "Public interest attaches to the ascertainment of the truth as to this issue. Such issues the parties cannot, by stipulation or otherwise, exclude from the area of judicial scrutiny and determination." 396 F.2d at 716; accord, *Wilko v. Swan*, *supra*, note 17.

made *after* the controversy had arisen, and as we shall discuss *infra*, this exception is critical to the case at bar.

Less clear are similar cases which have arisen under the Fair Labor Standards Act, ch. 676, 52 Stat. 1060, *as amended*, 29 U.S.C. §201 et seq (1970), and it is those cases that may cast some doubt on the Company's premise. Federal courts of appeal have held that when a claim is made under the Act and the settlement of that claim also falls within the grievance and arbitration provisions of a collective bargaining agreement, the employee must first attempt to arbitrate his claim. The rationale for this rule is that the claim grows out of the employment relationship and will necessarily require the application and interpretation of the collective bargaining agreement which governs the employer-employee relationship.<sup>19</sup> However, the most recent and better reasoned case is that of *Thompson v. Iowa Beef Packers, Inc.*, 185 N.W.2d 738 (1971), *cert. improvidently granted and denied*, 405 U.S. 228 (1972),<sup>20</sup> wherein the Iowa Supreme Court, citing *Arguelles*, held a Fair Labor Standards Act claim cannot be forced to arbitration in preference to the statutory action, and stated at 185 N.W. 2d 742:

We doubt that the general Congressional intent favoring arbitration can stand against the specific Congressional intent which is manifest in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court. We think Congress intended that workmen should have free access to the court in FLSA cases . . . . We believe that if Congressional intent to allow a seaman to arbitrate or sue at his option is manifest in the seaman's

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19. *Beckley v. Teyssier*, 332 F.2d 495 (9th Cir. 1964); *Evans v. Hudson Coal Co.*, 165 F.2d 970 (3rd Cir. 1948); *Watkins v. Hudson Coal Co.*, 151 F.2d 311 (3rd Cir. 1945), *cert. denied*, 327 U.S. 777 (1946); *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir. 1943).

20. *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972). Mr. Justice Rehnquist ordered that the writ of certiorari be dismissed as improvidently granted because, unlike the instant case, the collective bargaining agreement was not broad enough to give the arbitrator power to decide the issue.

act involved in *Arguelles*, as the Court held there, then an intent to give workmen such an option is also manifest in the Fair Labor Standards Act.

The above examination of statutes similar to Title VII and the cases arising under them serve to establish a critical premise which shall be assumed in the discussion, *infra*, that is, Alexander or any other similar Title VII claimant cannot be forced to arbitrate his claim in lieu of his Title VII action notwithstanding the provisions of the contract, that is to say, if an employee chooses to rely *exclusively* on his Title VII suit, he may do so.

IV.  
SELECTION OF THE ARBITRAL FORUM  
SHOULD PRECLUDE THE STATUTORY ACTION.

This Court has expressly left open the question of the enforceability of an agreement to arbitrate a statutory claim where the agreement to arbitrate the dispute was entered into *after* the controversy arose. *Wilko v. Swan*, 346 U.S. 427 (1953).<sup>21</sup> And in *Arguelles* this Court did not specifically address the question of whether or not arbitration and court action are concurrent optional remedies or mutually exclusive procedures. It would seem that both questions must be resolved herein.

It is asserted by the Company that when Alexander submitted his cause to the arbitrator, an agreement to arbitrate the statutory claim *after* the controversy arose was thereby created. True, the arbitration agreement was existent prior to the controversy, but such agreement, as it applies to Alexander's case, merely describes the arbitral forum and makes the same available in the event that Alexander chooses it. Being a party to an existing controversy, Alexander invoked the arbitral procedures when he was not required to do so,<sup>22</sup> thus the question left open by this Court in *Wilko v. Swan*, *supra*, calls for an answer herein. For the reasons explicated *infra*,<sup>23</sup> the arbitrator's decision and award must be held to preclude an entire relitigation of the charge in a Title VII action.

While the *Arguelles* opinion was limited only to a finding that the seaman could exercise his statutory right to sue his employer, notwithstanding the existence of an arbitration agreement, there is contained in the concurring opinion of

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21. Although the *Wilko v. Swan* case is distinguishable from the case at bar because it involved an identical question but under a statute (Securities Act of 1933, 15 U.S.C. § 77a *et seq*) which prohibited any form of waiver of its enforcement provisions, to the extent that the question above was left open, 346 U.S. at 438-439, it is not distinguishable.

22. See discussion, Section III, *supra* p. 17.

23. See discussion commencing at paragraph 1, p. 23, *infra*.

Mr. Justice Harlan an inference that arbitration and court action are not concurrent optional remedies but mutually exclusive procedures.

I think it obvious that the least desirable of all solutions would be to create a necessity for suits in both forums. In this circumstance, I think conflicting Congressional policies are best reconciled by the construing 46 U.S.C. § 596 and § 301 of the Labor-Management Relations Act as securing to the seaman an option to choose between arbitral and judicial forums where he states a claim under both the contract and 46 U.S.C. § 596. 400 U.S. at 366.

If we assume that the *Arguelles* court intended only one forum be available to the employee but he retains the option to choose the forum, then by analogy to *Arguelles* Alexander had a choice between Title VII and arbitration, just as *Arguelles* had between the Seamen's Act and arbitration. Once having made his choice, *Arguelles* would dictate that Alexander must live with the outcome of the chosen forum. But it would be presumptuous of the Company to assume that this Court intended exclusive remedies in *Arguelles* simply because of what the Company views as an inference of such in that decision. On a review of the considerations set forth below, the Company is persuaded that the inference of exclusive remedies in *Arguelles* must expressly be applied in the case at bar.

The Company suggests that the enormity of the labor arbitrator's function in today's industrial world and the necessity of rendering finality to his award is self-evident when the statistical data set forth below is given even a cursory examination. Based not on the assertion that practical considerations can override Congressional mandate where the mandate is clear, but rather on the assumption that Congress never intends to purposely create an impractical situation when conceiving and passing new legislation, practical considerations may also help this Court in placing the true Congressional intent underlying Title VII in focus.

The first fact of labor arbitrations which is irrefutable is that there are a lot of them, literally tens of thousands per year.<sup>24</sup> 94% of all collective bargaining agreements contain provisions for binding arbitration,<sup>25</sup> and in 1970 there were 160,000 collective bargaining agreements in the United States covering 25,000,000 employees.<sup>26</sup> Another truism is that almost half of all arbitrations involve employee discipline or discharge.<sup>27</sup> Since Title VII proscribes discrimination in employment based on race, color, religion, sex,<sup>28</sup> or national origin, it is not hard to conclude that a substantial portion of all employees who are disciplined or discharged under a union agreement are potential Title VII claimants. For instance, surely a good percentage of grievants are female, or Jewish, or aliens, or of Oriental or Spanish ancestry, not to mention those who are black or brown. Further, it can reasonably be anticipated that in this day of increased sensitivity on the part of minority groups to discriminatory employment practices, the issue of a discriminatory employment practice will be enmeshed in charges before the arbitrator, especially since 69% of collective bargaining agreements today contain non-discrimination clauses.<sup>29</sup>

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24. In fiscal year 1971 the Federal Mediation and Conciliation Service alone provided 13,235 panels of arbitrators, an increase of 18.9% over fiscal year 1970. 1972 BNA Labor Relations Yearbook 267. Additionally many thousands of arbitrations are conducted through the National Academy of Arbitrators, or arranged for privately by the parties. 20th Annual Meeting, National Academy of Arbitrators 45, 1971.

25. *Collyer Insulated Wire*, 192 NLRB No. 150, n. 20 (1971), citing U.S. Department of Labor, *Major Collective Bargaining Agreements: Grievance Procedures*, BLS Bulletin 1425-1 (1964); *Arbitration Procedures*, BLS Bulletin 1425-6 (1966).

26. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1750, *Directory of National Unions and Employee Associations* 87, 88 (1972).

27. 24 FMCS Ann. Rep. 55 (1971).

28. The New York Times, March 4, 1973, U.S. Business Roundup, recites an EEOC report (citation not presently available) which states it is estimated that sex discrimination charges now constitute as much as 40% of all incoming charges.

29. Broad non-discrimination clauses were contained in 46% of the collective bargaining agreements in 1969; 28% in 1966 and 22% in 1960. See 1969 BNA Labor Relations Yearbook 34; *Basic Patterns in Union Contracts* (7th ed. BNA 1971).

Thus it seems reasonable to conclude that a large portion of all labor arbitrations could be retried under Title VII,<sup>30</sup> as Alexander attempts here. As a result, the arbitration would operate only as a "trial balloon" for the grievant.<sup>31</sup> This very real possibility could lead employers to reject binding arbitration in their collective bargaining agreements as a means of settling industrial disputes.<sup>32</sup> Alternately, employers who have agreed to binding arbitration in the collective bargaining agreement may very well refuse to arbitrate selected cases, for instance, the discharge of a Negro claiming racial discrimination. Under those circumstances the employer's refusal to arbitrate the dispute cannot be called unreasonable or arbitrary since the employer can justifiably conclude that arbitration is an expensive exercise in futility. However, the employer's refusal to arbitrate in such circumstances creates disturbing reverberations in the courts and in the labor-relations field.

Upon an employer's refusal to arbitrate a grievance involving a Title VII question, it can reasonably be anticipated that the Union would request the U.S. District Court (under Section 301, *Lincoln Mills* and the *Steelworkers Trilogy*) to order the employer to arbitrate the dispute; however, the U. S. District Court conceivably would be unable to grant such relief since the District Courts' post-*Lincoln Mills* power to do so was derived, in part, on the fact that arbitration would be binding on all parties to the dispute. That mutuality of commitment to be bound by the arbitrator's award is a keystone of the *Lincoln Mills*' policy was made abundantly clear in *General Drivers Warehousemen and Helpers Union No. 89 v. Riss & Company, Inc.*, 372 U.S. 517 (1963); wherein this Court held that a

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30. The same can be said of a multitude of arbitration cases not involving discipline or discharge, for instance, employer failure to promote, employer failure to follow job bidding or bumping rules, or even failure to provide free parking as required by the union contract where motivation proscribed by Title VII is alleged against the employer, and such prohibition is contained in the collective bargaining agreement.

31. To use the words of Judge Winner in his District Court opinion below, see App. 43.

32. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 332 (6th Cir. 1970); *aff'd* by an equally divided court 402 U.S. 689 (1971); *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 252 (1970).

decision by an industry "committee" created under the contract is as enforceable in a Section 301 action as an arbitrator's award "if . . . the award of the Joint Area Cartage Committee is under the collective bargaining agreement *final and binding* . . ." 372 U.S. at 519 (Emphasis supplied.); ergo, unless the award is to be final and binding, the District Courts conceivably lack the power to order arbitration.

Further, since the *quid pro quo* for the no-strike guarantees in the collective bargaining agreement is the employer's willingness to proceed to binding arbitration on a dispute,<sup>33</sup> upon an employer's expressed unwillingness to arbitrate a given dispute because it is of a Title VII nature, the Union could conceivably strike in an effort to settle the dispute despite the no-strike provisions of the agreement without being subject to a court injunction under *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970), since the consideration offered by the employer for the Union's restraint has failed.

Thus, it becomes apparent that the Court's decision in this case cannot permit the use of multiple forums to decide the same issue without bringing about the tragic demise of the one form of private settlement of industrial labor disputes which has proved popular and workable and without creating legal and practical chaos in the labor relations world.

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33. *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 247, 248 (1970); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

## V.

TREATMENT OF THE INSTANT QUESTION  
BY FEDERAL CIRCUIT COURTS.

Federal Circuit Courts have treated the same problem differently, leaving a morass of confusion. What can be said generally of the circuit courts' decision is that they show, chronologically, an increasing degree of judicial revulsion to permitting a claimant multiple forums in which to be heard on the same issue.

The Seventh Circuit ruled in 1969 that arbitration could have no effect on a Title VII action, *Bowe v. Colgate-Palmolive Co.*,<sup>34</sup> 416 F.2d 711 (7th Cir. 1969). In 1970 the Sixth Circuit concluded that arbitration was binding and depositive of the Title VII action, *Dewey v. Reynolds Metal Co.*,<sup>35</sup> 429 F.2d 324 (6th Cir. 1970), *aff'd* by an equally divided court 402 U.S. 689 (1971) (Mr. Justice Harlan not participating), but later that holding was qualified and limited to cases where the Title VII

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34. Women employees working under a collective bargaining agreement filed a Title VII sex discrimination suit against both the union and the company. The district court required the women to elect between court action and arbitration which had not yet been invoked. *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967). The Court of Appeals for the Seventh Circuit reversed and held that a plaintiff could simultaneously proceed in both forums because "there may be crucial differences between the two processes and the remedies afforded by each." 416 F.2d at 715. The court also found conclusive the analogy to a charge before the National Labor Relations Board under the Labor-Management Relations Act where an arbitrator proceeds simultaneously on the same charge under the contract. The court concluded that election of remedies applies only after final decision is reached in both forums, in order to prevent unjust enrichment.

35. Dewey claimed that he was wrongfully discharged because of his religious beliefs. The employee filed a grievance and a state civil rights complaint simultaneously. The arbitration award was rendered first and denied the relief sought. As a result, the Court of Appeals held that the Title VII suit, which was subsequently filed, would not be allowed. The Court held that the Sunday overtime provision of the collective bargaining agreement was not discriminatory on its face or on its impact, and therefore, the employer's actions with regard to accommodation of Dewey's religious needs were not unreasonable.

action is filed after the arbitrator's award only. *Spann v. Kaywood Division, Joanna Western Mills Co.*,<sup>36</sup> 446 F.2d 120 (6th Cir. 1971). The Fifth Circuit recently held that a court may defer to an arbitrator's award if a number of specified conditions are met, *Rios v. Reynolds Metals Co.*,<sup>37</sup> 467 F.2d 54 (5th Cir. 1972), and even more recently the circuit court for the District of Columbia seemed to imply adoption of a deferral policy. *Macklin v. Spector Freight Systems, Inc.*, \_\_\_ F.2d \_\_\_,

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36. A Negro employee was reinstated by an arbitrator to his job without back pay and the court refused to allow the employee to maintain a Title VII action for such back pay. The court emphasized that Spann like Dewey, only filed his court action after an award was made by the arbitrator. In *Spann*, the court did not address the issue where a Title VII action might precede the arbitration award. The court was repelled by the "successive monogamy" of remedies.", (446 F.2d at 123) sought by Spann and Dewey, i.e., arbitration, state civil rights commission, EEOC, and Title VII. Compare, *Newman v. Avco Corp., Aerospace Structural Division*, 451 F.2d 743 (6th Cir. 1971) which arose on Spann's heels. The court found therein that the contract did not prohibit racial discrimination, that the issue in the Title VII action was not before the arbitrator, that the arbitration hearing was not fair and impartial and therefore the case was remanded for trial under Title VII. The court described its Dewey and Spann theories as the equitable doctrine of estoppel. See also *Thomas v. Philip Carey Mfg. Co.*, 455 F.2d 911 (6th Cir. 1972).

37. A Mexican-American employee raised, *inter alia*, the issue at arbitration of racial discrimination and had filed his Title VII action in district court prior to the arbitration. The district court granted summary judgment for the employer. In remanding the case for trial, the Fifth Circuit defined explicitly the impact of an arbitrator's award on a Title VII action where the contract proscribed employer action against an employee based on racial discrimination. Analogizing to the NLRB's Spielberg Doctrine (*Spielberg Mfg. Co.*, 112 NLRB 1080 (1955)) wherein the Board determined that under circumstances it deemed to be proper, the Board would defer to an arbitration where the issue was identical to that before the Board. The Fifth Circuit decided that district courts can defer to an arbitrator's award only if the employer can prove that seven specified conditions were met in the arbitration proceeding. See p. 34, *infra*, for a recitation of those conditions.

5 FEP Cases 994 (D.C. Cir. 1973).<sup>38</sup> Alexander's suggestion herein is that the arbitrator's decision and award should have only the status of evidence in the Title VII action.<sup>39</sup> In analyzing the problem, some of the courts used, attempted to use, or rejected traditional concepts of collateral estoppel, res judicata, or election of remedies; the Company herein will avoid the use of such terms for the reasons expressed below.

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38. But the *Macklin* court interpreted *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), as establishing "a federal policy of deference," \_\_\_\_ F.2d \_\_\_\_, 5 FEP Cases at 1002, which, considering the case at bar, would appear to constitute an overly presumptuous reading of *Enterprise*.

39. Brief for Petitioner at 41.

VI.  
**TRADITIONAL PROCEDURAL RULES  
 OF JUDICIAL ADMINISTRATION ARE  
 INAPPLICABLE TO THE CASE AT BAR.**

Long standing procedural rules of judicial administration such as election of remedies, *res judicata*, collateral estoppel or combinations of them are interwoven in judicial analyses in cases similar to the one at bar. We submit that the resultant confusion is caused by the search for classical answers to non-classical and contemporary problems. These rules have their genesis in ordinary public policy considerations. Not only have these doctrines been ill-defined and abused in application, but the attendant result has been mass confusion and questionable jurisprudence.

The doctrine of election of remedies generally holds that one who makes a knowing and voluntary adoption of two or more inconsistent remedial rights (for example, contract rescission vs. contract damages) is precluded from resorting to one or the other.<sup>40</sup> Although the United States Supreme Court long ago referred to the election of remedies rule as "harsh" and "largely obsolete", *Friderichsen v. Renard*, 247 U.S. 207, 213 (1918) lower courts have nevertheless attempted to utilize the doctrine in wrestling with an arbitral determination on a discrimination question and its impact on a subsequent Title VII action.<sup>41</sup> By its very definition the doctrine has no application

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40. Comment, *Title VII of the Civil Rights Act of 1964 Employee's Pursuance of the Collective Bargaining Grievance Procedure Held to Bar Subsequent Judicial Proceedings on a Racial Discrimination Complaint*, 44 N.Y.U.L. Rev. 404 (1969); Comment, *Dewey v. Reynolds Metal Co.: Labor Arbitration and Title VII*, 119 U.Pa. L. Rev. 684 (1971).

41. *Oubichon v. North American Rockwell Corp.*, 325 F. Supp. 1033, (C.D. Cal. 1970); *Newman v. Avco Corp.*, 313 F. Supp. 1069, 1071 (M.D. Tenn. 1970); *Fekete v. United States Steel Corp.*, 300 F.Supp. 22, 23 (W.D. Pa. 1969); *Edwards v. North American Rockwell Corp.*, 291 F.Supp. 199, 208 (C.D. Cal. 1968); *Washington v. Aerojet-General Corp.*, 282 F.Supp. 517, 523 (C.D. Cal. 1968); *Bowe v. Colgate-Palmolive Co.*, 272 F.Supp. 332, 339 (S.D. Ind. 1967). The doctrine has been used and confused with other arguments thereby resulting in much misunderstanding. *Dewey v. Reynolds Metal Co.*, 291 F.Supp. 786, 788 (W.D. Mich. 1968); *Bowe v. Colgate-Palmolive Co.*, *supra*, *Edwards v. North American Rockwell Corp.*, 291 F. Supp. 199, 208 (C.D. Cal. 1968), ("Plaintiff made a binding election of forums and remedies.")

to the issues now under consideration. Not only does the plaintiff in a Title VII action expressly rely upon the same basic facts asserted in the arbitration but, also, the remedies provided by each forum have close identity, and, while they may be duplicative, they are not inconsistent.<sup>42</sup>

The use of the doctrines of res judicata and collateral estoppel to preclude a Title VII action is likewise misplaced when considered in light of strong policy considerations attendant to the Civil Rights Act. Both doctrines are rooted in a policy which favors finality, to the exclusion of all other countervailing interests. In its application, res judicata limits the litigant to one fair trial of a cause, *Fayerweather v. Ritch*, 195 U.S. 276 (1904); 50 C.J.S. Judgments § 592 (1947), and collateral estoppel prevents litigation of issues already determined without regard to identity of the causes of action. *Lawlor v. National Screens Service Corp.*, 349 U.S. 332, 326 (1955); Moore's Federal Practice, 0.405(1) 2d Ed. (1965). The fatal flaw contained within each doctrine is that it operates summarily to cut off the rights of the litigant, and they are not broad enough even to permit judicial review of the prior judgment to determine the appropriateness of deferral to it. In matters of employment discrimination, any classical doctrine that operates to summarily terminate the airing of a claim having an overriding public interest cannot be endured. Whatever analysis this court ultimately makes of the case at bar, it must provide for a judicial peek at the prior proceedings in order to safeguard the public interest.

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42. A classic example of the confusion which reigns in the application of this traditional doctrine is contained in the case at bar. In Alexander's brief, page 43, Alexander describes the rationale of the courts below in this case as relying upon "election of remedies" since the courts below relied upon *Dewey v. Reynolds Metals Company*, *supra*. However, the *Dewey* court in a subsequent case, *Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971) at N. 1 described its *Dewey* doctrine as "themes of res judicata and collateral estoppel" and specifically disavowed the doctrine of election of remedies.

**VII.  
ANALYSIS OF THE VARIOUS CIRCUITS'  
REASONING AND ALEXANDER'S POSITION.**

Each of the four theories must be separately analyzed and weighed.

**A. Arbitration is Never Preclusive of a Title VII Action  
(Seventh Circuit).**

To conclude that a Title VII action is never precluded by an arbitrator's award on the same issue is contrary to this Court's previously discussed arbitration doctrine and amounts to carving an exception to the principle established in *Lincoln Mills*, the *Steelworkers Trilogy* and their progeny which concluded that labor arbitration must be underpinned and strenuously reinforced by the courts. When one considers the enormous number of workers included in the five classes of claimants protected by Title VII, the number of collective bargaining contracts that contain non-discrimination clauses today,<sup>43</sup> and the likelihood that the grievant will enmesh his or her discrimination claim in the arbitration proceedings, (as did Alexander), one realizes that the exception to the *Lincoln Mills* principle espoused by the Seventh Circuit in *Bowe* must necessarily be so broad as to engulf the rule, since the exceptions conceivably constitute a significant portion of all labor arbitration cases heard today. The case of Alexander and his allegations of discharge based on racial discrimination is only the tip of the iceberg.

**B. Arbitration Precludes a Title VII Action Only if the  
Title VII Action was Filed After an Adverse Arbitration  
Award (Sixth Circuit).**

The Company herein submits that the chronological sequence used by the employee in the selection of forums is not material at all to the question of the finality of the arbitrator's award. First, it is apparent that in a normal grievance-arbitration case the contract procedures will be concluded and the arbitrator's award rendered before an employee can fulfill the statutory

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43. See Note 29, *supra*.

conditions precedent to the filing of a Title VII action,<sup>44</sup> and so in almost every instance the Title VII case would be filed too late and subject to automatic dismissal under the Sixth Circuit's reasoning in *Spann*. If a statutory action is to be precluded by an arbitrator's award, a sounder reasoning would seem necessary.

In *Spann* the Sixth Circuit indicated that simultaneous use of both methods of procedure, i.e., arbitration and the commencement of statutory steps, will preserve the Title VII action from attack later when the employee received an adverse arbitration award. This, too, does not withstand critical analysis. When an employee commences his statutory remedies by filing with a state agency prior to the arbitrator's award (as did Alexander), he thereby indicates his awareness of his statutory action and thus establishes his ability to knowingly preserve his Title VII action by *not* submitting the discrimination question to the arbitrator. It follows that if he does continue to charge discrimination in the arbitral forum he thereby indicates that he chooses to cast the fortunes of his discrimination claim upon the arbitral waters. For this reason, the

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44. For the statutory procedures followed subsequent to the filing of a charge in a Title VII action see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 42 U.S.C.A. § 2000e-5 (Supp. 1972).

It seems fair to conclude that these statutory guidelines are in actuality rarely if ever attained. For example, in the fiscal year ending June 30, 1972, the EEOC had a total of 52,000 charges alleging discriminatory practices. Of this number 33,000 were new charges. By deduction this would mean that 19,000 cases were carried over from the previous year which had not even reached the stage of being recommended for investigation. It seems reasonable to conclude that these 19,000 cases were at least one year old. In fiscal year ending June 30, 1971, the EEOC had a total of 33,000 charges of which only 23,000 were filed during that year leaving 10,000 cases older than one year. By the end of the fiscal year June 30, 1973, it is projected that a backlog of 70,000 complaints will exist. See *The New York Times*, March 4, 1973, U.S. Business Roundup; See *U. S. News and World Report*, June 18, 1973, p. 89, "The agency backlog of complaints now totals at least 60,000 cases."

Compare: In 1970 the average time lapse between a request for an arbitrator and the rendering of an award was 164.2 days, 1971 BNA Labor Relations Yearbook 283.

Company views the simultaneous use of both contract and statutory procedures to have a preclusive impact upon the Title VII action, rather than a permissive impact as the Sixth Circuit views it.

**C. A Court May Defer to an Arbitration Award Under Stringent Guidelines (Fifth Circuit and possibly Circuit Court of Appeals for the District of Columbia).**

In its *Rios* decision, the Fifth Circuit concluded that courts may, under specified conditions, defer to an arbitrator's award. The conditions specified read:

First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant. (467 F.2d at 58)

While a concept of deferral is not wholly repugnant to the Company herein,<sup>45</sup> the *Rios* rules of deferral contain a clearly fatal flaw, that is, an arbitration of a Title VII type claim would have to compare favorably, both procedurally and substantively, with a trial the claimant would receive in U. S. District Court.

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45. See Suggestion of Company, Section VIII, p. 37, *infra*.

Under *Rios* deferral rules a prudent company would of course want to be represented by counsel at such a hearing and would insist on a transcript of the proceedings; the arbitrator would naturally apply more strict rules of evidence and may even be faced with questions concerning some limited forms of discovery, and the arbitrator would certainly schedule a longer hearing than usual in order to accommodate the company's District Court-type advocacy. At the conclusion of the hearing the arbitrator would then attempt to issue a decision and award that conforms in all respects to a detailed and written Findings of Fact and Conclusions such as one would expect to be rendered by a U. S. District Court. The arbitration procedure, under *Rios*, therefore becomes exactly that which it was intended not to be: 1) lengthy, 2) costly, 3) unnecessarily complicated, 4) legalistic. The arbitrator's ability to dispense timely industrial justice is materially hampered. Further, under the multiple rules of *Rios* for deferral, the district court would find itself holding a hearing to determine if deferral was appropriate, which hearing could, we fear, in length and complexity be similar to a Title VII trial.

#### **D. The Arbitration Award Should Only Be Considered as Evidence in A Title VII Action (Alexander's Theory).**

Alexander's suggestion that an arbitrator's award be relegated to the status of evidence (presumably probative evidence) in a Title VII action is subject to the same criticism as set forth above with respect to the Seventh Circuit's decision in *Bowe*, i.e., it emasculates the degree of respect and finality traditionally and necessarily accorded a labor arbitrator's award.

Alexander, in support of his assertion, cites *Smith v. Universal Services, Inc.*, 454 F.2d 154, rehearing denied, 454 F.2d 154 (5th Cir. 1972). The court therein held that it would be a waste of manpower and resources to ignore as evidence in a Title VII action the report of the EEOC investigator, and that the report would constitute an exception to the hearsay rule under the Federal Business Records Act, 28 U.S.C. § 1732 (1970). In the case at bar, the arbitration award would not, of course, fall under the Federal Business Records Act and simply remains hearsay and inadmissible. On Petition for rehearing in *Smith* which was denied, a sharply critical dissent was entered by

Judge Dyer, asserting in part that the EEOC report was simply hearsay and not admissible. If the arbitration award and an EEOC report raise the same question of admissibility, once the Federal Business Records Act is put aside, the comments of Judge Dyer, 454 F.2d at 160-61, relating to the hearsay question, are appropriate here:

The opinion instructs the district court that it is obligated to hear evidence of *whatever nature* that is probative. Not only do I disagree with the breadth of this pronouncement but it would seem clear that this type of evidence is not categorically 'probative.' As the opinion points out, the EEOC report 'contains findings of fact made from different witnesses, subjective comment on the credibility of these witnesses and reaches [a] conclusion.'

The credibility of witnesses has historically been the sole function of the fact finder. An opinion concerning credibility by a so-called expert would be superfluous and inadmissible. 7 Wigmore, Evidence § 1918 (1940); McCormick, Evidence § 12 (1954); Note, Revised Business Entry Statutes; Theory and Practice, 48 Colum. L. Rev. 920, 930 (1948). The judge, as the fact finder in a Title VII suit, is hopefully more of an expert on the credibility of witnesses than is an EEOC investigator.

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It is undisputed that the EEOC report is merely a cumulation of hearsay and contains the opinion of the investigator based upon his credibility choices with respect to the hearsay.<sup>46</sup>

Additionally, the Company continues to strenuously assert that Alexander's theory is subject to the same criticism as the *Bowe* decision of the Seventh Circuit as expressed in Section VII (A) *supra*, that is, it emasculates this Court's past doctrine of underpinning labor arbitration.

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46. See also *Heard v. Mueller Co.*, 464 F.2d 190 (6th Cir. 1972).

### VIII. THE COMPANY'S SUGGESTION.

Having found each of the various theories proffered by the circuits and Alexander unacceptable as explained above, the Company herein presumes to suggest to this Court a solution that appears to the Company to be consistent with the desires of Congress and this Court's past policies in the areas of Title VII and labor relations, and which appears to be the only workable solution. The Company suggests that this Court adopt a policy of liberal deferral to the arbitral award when that forum is chosen by the Title VII plaintiff. *This is not to suggest that the multi-faceted Rios deferral formula be employed.* (See criticism at Section VII(C), p. 34 *supra*) but it is to suggest a deferral by the federal courts to the decision in the arbitral forum if the following criteria are met:

1. The charge of discrimination was before the arbitrator.
2. The contract prohibited the form of discrimination charged.
3. The arbitrator had authority to rule on the charge and fashion a remedy.<sup>47</sup>

Limited judicial review of arbitration awards is not novel. Plenary judicial review of the arbitrator's decision would render arbitration a meaningless exercise, merely a condition precedent to final determination by the courts; it would be "the commencement, not the end, of litigation." *Burchell v. Marsh*, 58 U.S. (17 How.) 96, 99 (1855). In *Enterprise Wheel & Car Corp.*, *supra*, 363 U.S. at 596 this Court stated:

The refusal of the courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award.

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47. Each of the three listed elements was present in the case at bar.

That the choice by an employee of the arbitration forum may result in the employee's case being considered in a manner somewhat different in form than the consideration his case would probably receive in district court, is of course a possibility.<sup>48</sup> However, in *Arguelles, supra*, Mr. Justice Harlan, in concurring, recognized that possibility and stated at 400 U.S. 359-60:

This Court has always recognized that the choice of forums inevitably affects the scope of the substantive right to be vindicated before the chosen forum. In particular, where arbitration is concerned, the Court has been acutely sensitive to these differences.

And at 400 U.S. 361:

Normally, the impact on the substantive right resulting from the decision to remit the individual to the arbitral forum is acceptable because the parties themselves have consented to that forum.

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48. There is no requirement that counsel be present for either side at arbitration hearings, or that witnesses be sworn, or that the rules of evidence be applied; arbitrators need not make a written explication of their award although almost all do. *United Steelworkers v. Enterprise Wheel & Car Corp., supra*, 363 U.S. at 598.

On the other hand, in the arbitration of a discipline or discharge case, the company has the burden of proof, and to that extent the employee alleging the application of discriminatory employment practice in his discharge or discipline has a greater advantage than he would have in the United States District Court in a Title VII action. The burden of proof placed upon the employer which it must meet in order to convince the arbitrator that the discipline or discharge was for just cause is measured by different standards depending on the case and the arbitrator. Sometimes a "beyond a reasonable doubt" standard is used, *A. S. Beck Shoe Corp.*, 2 Lab. Arb. 212 (1944); or "clear and convincing", *Aviation Maintenance Corp.*, 8 Lab. Arb. 261 (1947); or "clear, unequivocal and convincing", *Armco Steel Corp.*, 48 Lab. Arb. 132 (1967); or "preponderance of evidence", *Campbell Wyant and Cannon Foundry Co.*, 1 Lab. Arb. 254 (1945). In determining the burden of proof which the employer must meet, arbitrators appear to increase the severity of the burden concomitant with the severity of the conduct alleged against the employee.

The key is the consent of the employee. It is submitted that Congress in Title VII gave the employee a right to sue,<sup>49</sup> and as possessor of that right the employee may use it fully by filing a comprehensive Title VII action, or not use it at all, or use it partially (by bringing an individual action rather than a class action) or submit it to another forum. It is noted here, again, that this Court has expressly left open the question of whether or not an agreement to arbitrate would be binding on a statutory claim if the agreement to arbitrate was entered into after the controversy arose.<sup>50</sup> Having established that Alexander could not have been forced to test his discrimination claim in the arbitral forum,<sup>51</sup> but did so voluntarily after he was aware of his Title VII claim,<sup>52</sup> it must follow that Alexander is bound by the arbitration award, as is the Company. In this context it is important to note that the Company does not even suggest that Alexander should be precluded from filing a charge with the EEOC because of the arbitration award; to do so would clearly be inconsistent with the mandates of the Act. If the EEOC in its wisdom should later determine that there are compelling public policy reasons to pursue the matter through the courts on behalf of a class of employees similarly situated, it retains the statutory prerogative to do so by instituting its own suit.

The critic of the Company's suggestion will understandably point out that a union or employer might coerce the employee into selecting the arbitral forum, or the union may purposefully under-represent the employee's interests, or collusion

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49. Of course, Congress in 1964 also gave the Department of Justice the right to sue in cases wherein "the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance." . . . to the rights protected by Title VII. Pub. L. No. 88-352, 78 Stat. 261, 42 U.S.C. §2000e-6 (1970). In 1972, Congress gave the Equal Employment Opportunity Commission enforcement powers and the right to file civil actions. Pub. L. No. 92-261, 86 Stat. 104, 42 U.S.C.A. §2000e-5 (Supp. 1972).

50. See discussion Section IV, *supra*, p. 22.

51. See discussion Section III, *supra*, p. 17.

52. It will be recalled that Alexander commenced his statutory procedures, i.e., the filing of a charge with the Colorado Civil Rights Commission prior to the arbitration hearing.

between the union and the company may result in the repression of relevant evidence. However, under well-established law, such instances, if provable, would not result in the forfeiture of the employee's Title VII action,<sup>53</sup> and these traditional safeguards against coercion, fraud, etc., are included implicitly in the Company's proffered doctrine.

The critic might also point out that under most collective bargaining agreements, including the one now before the Court, the offended employee has only a handful of days to file his grievance or lose it, thus placing an onerous and perhaps impossible burden on the unsophisticated employee to make an intelligent choice of forums quickly, assuming he is even aware he has a choice. Half the answer to that problem is that if the employee lets the short grievance filing time run without filing his grievance, he has his Title VII action yet available. The other half of the answer is that if he files the grievance, he cannot be precluded from his Title VII action until he voluntarily submits his case to the arbitrator; this is not an arbitrary cut-off point since there is a vital and distinct difference between the reason for grievance steps and the nature of the arbitration step. All grievance steps have one object, that is, a voluntary solution of the problem by union and management. One must acknowledge that the employee's individual interests may not be accorded the highest respect in the various grievance stages; it is a fact of industrial labor relations that grievances are often-times traded off against other grievances; it is also a fact that grievance steps rarely present the employee with an opportunity for a full hearing; it is another fact that grievance settlement presents the union and the company with an unquestionable opportunity to conspire against the employee if they are of such a bent.

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53. Fed. R. Civ. P. 60(b) states in part: "... [T]he court may relieve a party of his legal representative from a final judgment, order, or proceeding for the following reasons: ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ... ." See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944); *Marshall v. Holmes*, 141 U.S. 589 (1891); *Griffith v. Bank of New York*, 147 F.2d 899 (2d Cir.), cert. denied, 325 U.S. 874 (1945).

On the positive side, the grievance steps may result in a settlement that is satisfactory to all parties, including the employee, and the opportunity for such settlement ought not be hampered, as would naturally result if the act of filing a grievance resulted in closing the courthouse door to the employee. The concept of the arbitration step contrasts sharply with the nature of the grievance steps since at arbitration the parties have irrevocably agreed to submit their disagreement to the impartial arbitrator for a final and binding award. Logically then, it would seem that the Title VII action of the employee cannot be precluded until he voluntarily submits the same charge to the arbitrator; practically, this will provide sufficient time for the employee to ponder which forum to choose.

## IX.

**THE 1972 AMENDMENTS DO NOT CHANGE  
THE COMPLEXION OF THE INSTANT CASE.**

The 1972 Amendments to the Civil Rights Act added language to the 1964 Act which described the status of determinations made by State or local agencies, in that the EEOC was directed to "... accord substantial weight to final findings and orders made by State or local authorities." Section 706(6)(b), Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C. § 2000e-5(b). Alexander asserts that the reluctance of Congress to give binding effect to a State or local determination is evidence of its intent that the federal courts be the final arbiter in every case of any Title VII claim. Brief for Petitioner, p. 17-18. A comparison of State or local determinations to that of an arbitrator is inappropriate for there is a critical difference between the two that defeats the validity of the comparison. Arbitration is a *consensual* relationship between the employee and his employer while State or local proceedings arise from a charge required to be filed by the employee if he desires access to the EEOC and to which the employer must, by law, respond. Thus, since the State procedures are mandatory and since potential infirmities exist in some State or local procedures or laws, it was the concern of Congress that an employee not be *required by law* to accept those infirmities, and the 1972 Amendments state expressly what impliedly was mandated in the 1964 Act. Senator Joseph Clark, in reference to this concern before passage of the 1964 Act, stated:

... State and local FEPC laws vary widely in effectiveness. In many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget. Big interstate industry cannot effectively be handled by the States. 2 Schwartz, Statutory History of the United States: Civil Rights 1290 (1970)

Congress only was concerned that no other sovereign, law, or procedure *require* Alexander to accept less than his day in Federal District Court on his civil rights claim, and Congress did not address itself to a *voluntary choice* by Alexander after the controversy arose to test his claim in another forum.

## X.

**IMPACT ON THE CASE AT BAR OF MULTIPLICITY OF REMEDIES ALREADY EXISTING FOR THE EMPLOYEE.**

In Alexander's brief before this Court, the controversy between Alexander and the Company herein is paralleled to the Biblical confrontation between David and Goliath. Alexander asserts that David (Alexander) is not unfairly equipped for battle with Goliath (the Company) if David is given two stones (arbitration and Title VII) for his sling. The Company (Goliath) is pictured as a behemoth with "armoured columns and nuclear weapons" to aid him in the confrontation.<sup>54</sup> When one reflects upon the broad range of laws, executive orders and administrative policies under which a minority employee offended by an alleged act of employment discrimination can vindicate his rights (free of cost), and when one considers that the Civil Rights Act as amended in 1972 applies also to small businesses having 15 or more employees,<sup>55</sup> one must then ponder whether the roles in the David and Goliath comparison are not in fact reversed, that is to say, one has cause to speculate on who is David and who is Goliath?

As recited in Petitioner's Brief,<sup>56</sup> there are at least *seven* remedies created by Congress and the executive to which an offended minority employee may resort, none of which are exclusive and all of which are provided the employee without expense.<sup>57</sup> In the case at bar Alexander would seek to add yet another, arbitration.

In 1972, the Deputy General Counsel of the EEOC, John D. J. Pemberton, Jr., described an employer's dilemma on matters of alleged employment discrimination and litigation with respect thereto, accurately and succinctly when he stated: "But if the number of them [multiple employee remedies] is not awesome

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54. Brief for Petitioner at 42.

55. Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C.A. § 2000e(b) (Supp. 1972).

56. Brief for Petitioner at 20-22.

57. In many instances this may include court-appointed counsel, as in Alexander's case.

enough, the lack of finality in any decision on behalf of the respondent certainly poses a defendant's nightmare."<sup>58</sup> Surely, in passing Title VII, Congress only intended to provide a powerful tool with which to eliminate employment discrimination and certainly did not intend to create a nightmare of litigation for anyone.

One must accord the late Senator Dirksen some measure of clairvoyancy when, during the Senate debates on Title VII, he protested such a scheme as is here proposed by questioning:

Should we draw and quarter the victim?<sup>59</sup>

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58. Address by John D. J. Pemberton, Jr., Deputy General Counsel, Equal Employment Opportunity Commission, August 15, 1972, at the Annual meeting of the American Bar Association, San Francisco, California, Section on Labor Relations Law, BNA Bull. No. 160 (1972).

59. 110 Cong. Rec. 6449 (1964) (Remarks of Senator Dirksen). It is appropriate here to note that Alexander requested an award of attorneys' fees in the event this Court orders a remand. (Brief for Petitioner at 49). Petitioner's supplication overlooks the possibility that the Company may be innocent of the charge alleged, and Petitioner is in error when it states (Brief for Petitioner at 49, n. 16) that such an award of attorneys' fees is authorized by Title VII. Section 2000e-5(k) of the statute can only be read to warrant attorneys' fees in the event the charges alleged are found to be true.

**CONCLUSION**

For the reasons explicated above, this Court is respectfully urged by the Company to apply a policy of liberal deferral to the arbitrator's award, to determine that the lower courts herein properly conformed to that policy, and to affirm for those reasons.

Respectfully submitted,

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